

DAVID L. ANDERSON (CABN 149604)
United States Attorney

HALLIE HOFFMAN (CABN 210020)
Chief, Criminal Division

ROBIN L. HARRIS (CABN 123364)
LLOYD FARNHAM (CABN 202231)
CHRIS KALTSAS (NYBN 5460902)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7200
Facsimile: (415) 436-7234
Email: robin.harris2@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	CASE NO. CR-18-00310 EMC
Plaintiff,)	
v.)	UNITED STATES' RESPONSE TO
)	DEFENDANT'S OBJECTION TO VIDEO
LAWRENCE GERRANS,)	HEARING
Defendant.)	DATE: December 9, 2020
)	TIME: 9:00 a.m.
)	COURT: Hon. Edward M. Chen

INTRODUCTION

At the sentencing hearing conducted in-person on November 4, 2020, the Court set a further hearing for December 9, 2020 to address restitution and the government's previously-briefed motion for a preliminary order of forfeiture ("POF"). On December 7, 2020, following a regional stay-at-home order, the Court converted the hearing to be conducted by video conference. Defendant objected to a video hearing related to restitution and POF, but consents to a video hearing on his motion for reconsideration of prior orders denying release. The defendant's objections are not well taken.

First, the defendant has not cited legal authority that bars the Court from conducting these

proceedings by video, and the defendant will not be prejudiced if he appears by video rather than being physically present in the courtroom. None of the participants, including government counsel, will be physically present as a result of the recent regional stay-at-home order. Thus, there is no harm to the defendant if the Court conducts the restitution and forfeiture hearings by video conference.

In addition, the defendant has no right to a hearing on his request that the Court reconsider the November 4 decision denying his motion for bail pending appeal. Title 18 U.S.C. § 3142(f) by its plain terms applies only to pre-conviction detention. Defendant has been sentenced and judgment has been entered. Dkt 320. To the extent defendant's motion for reconsideration is directed at the Court's denial of bail pending appeal, his request is governed by 18 U.S.C. § 3143(b)(A)(B). Section 3143 has no provision for a hearing on a motion for bail pending appeal and no hearing needs to be—nor should be—held on a motion for reconsideration of the denial of bail pending appeal. Accordingly, the government respectfully requests the Court to deny defendant's motion for reconsideration, Dkt 340, based upon the materials previously submitted to the Court.

DISCUSSION

A. The Court Can Determine Restitution By Video Conference

The defendant has not articulated a statutory or constitutional right to be physically present at a hearing at which the Court will determine the appropriate restitution amount. The cases cited by the defendant in his objection relate to proceedings that are directly referenced in Rule 43, such as a change of plea and sentencing or resentencing. Dkt 357 (Objection) at 2, citing *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018) (plea conducted by video with consent of the defendant);¹ *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001) (sentencing); *United States v. Zander*, 705 Fed. Appx. 707 (10th Cir. 2017) (resentencing). The only Ninth Circuit case cited by the defendant concluded that the district court's entry of an amended judgment after sentencing to include restitution without a further hearing was harmless error where the defendant had the opportunity to object in writing to the evidence supporting and the amount of restitution. *United States v. Marks*, 530 F.3d 799, 813 (9th Cir. 2008).

¹ The holding of this case, that Rule 43 requires in-person sentencing hearings even if the defendant consents and waives his appearance, has been abrogated by the CARES Act, which authorizes District Courts in certain circumstances to conduct video sentencing hearings with the consent of the defendant. H. R. 748—248, Sec. 15002(b)(2).

None of these cases support the principle that the defendant has a right to a physical instead of video appearance at a restitution hearing held *after* the sentencing hearing, especially where he will have had an opportunity to be heard both in writing and through his counsel at the video hearing.

The defendant in this case had a full sentencing hearing on November 4, 2020, at which he was physically present and personally addressed the Court in a lengthy allocution. Thereafter, the Court imposed a sentence at that hearing and later issued a judgment which included that sentence. Dkt 320. The appropriate question before the Court now is whether the defendant is entitled to be physically present—as opposed to participating by video—for the continued proceedings which are limited to determining the amount of restitution. Under the statute governing restitution, the final determination of victim losses can be determined up to 90 days “after sentencing,” and in this case the Court continued the determination of the amount of loss to a date after both the sentencing and the entry of judgement on the sentence. 18 U.S.C. § 3664(d)(5). In *United States v. Samuel*, 663 F. App’x 508, 514 (9th Cir. 2016) (unpublished), the defendant participated in a restitution hearing by video, and the Ninth Circuit held that this type of participation was at most harmless error because the defendant received a “fair and just hearing” and was not prejudiced by not being physically present. Similarly, in an unpublished case issued during the pandemic, the Ninth Circuit upheld an order of restitution in which the amount of restitution was determined without an in-person hearing and where the defendant was on notice that the issue may be determined without a hearing and was provided the opportunity to oppose the restitution amounts. *United States v. Mehmood*, 2020 U.S. App. LEXIS 31681, at *5 (9th Cir. Oct. 6, 2020). The defendant has not shown that a video hearing, in light of the record to date and the full opportunity he has had to object and be heard on restitution, would violate due process or statutory rights.

B. The Court Can Enter Preliminary Order of Forfeiture by Video Conference

Defendant also objects to a hearing to address the entry of a preliminary order of forfeiture taking place by video, and asks that the Court continue the hearing to an indeterminate date and time when all parties can be personally present. Dkt No. 357 at 3. Because of the procedural posture and the nature of the defendant’s opposition to the entry of the POF, this hearing involves only a question of law, thereby exempting the proceedings from Federal Rule of Criminal Procedure 43(a). *See* Fed. R. Crim. P. 43(b)(3).

1 First, one issue to be addressed at the hearing is the government's request for a correction to the
2 judgment pursuant to Rule 36. Because the correction to the judgment to include reference to the
3 forfeiture does not implicate a stage of trial or sentencing, this aspect of the upcoming hearing is outside
4 the scope of Rule 43. There is no due process concern with the Court correcting the judgment at a
5 hearing in which the defendant and counsel are present by video. *See e.g. United States v. Portillo*, 363
6 F.3d 1161, 1166 (11th Cir. 2004) ("The right to be present at one's sentencing does not translate into a
7 right to be present whenever judicial action modifying a sentence is taken.").

8 Second, defendant's objection to appearing by video to be heard regarding the entry of the
9 preliminary order of forfeiture should also be overruled. Rule 43 is the codification of a due process
10 guarantee that applies "to the extent that a fair and just hearing would be thwarted by [the defendant's]
11 absence, and to that extent only." *United States v. Cazares*, 788 F.3d 956, 970 (9th Cir. 2015) (quoting
12 *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)). In this case, defendant's appearance
13 by video, as opposed to in person, at the forfeiture and restitution hearing would not thwart a fair and
14 just hearing. This is especially true because the defendant has not filed or provided anything new beyond
15 what was already briefed before sentencing, and the Court can decide whether to enter the preliminary
16 order of forfeiture on the basis of the current record. In fact, when the defendant previously argued that
17 the Court should defer forfeiture and continue the hearing until after sentencing, counsel admitted that
18 forfeiture proceedings were appropriate, implying that defendant does not have factual arguments
19 against forfeiture: "[A]ny forfeiture isn't going to be a punishment to Mr. Gerrans. *He's losing the*
20 *house*. It is completely related to who can get money back." 11/4/20 RT at pg. 78 (emphasis added).
21 This view is consistent with the briefing already submitted by the defendant: He has not opposed the
22 factual basis for forfeiture, conceding that the house was purchased with the proceeds of the fraud
23 scheme as convicted by the jury.

24 Accordingly, because nothing outside the current record will be submitted at the hearing, the
25 "proceeding involves only a conference or hearing on a question of law," to wit, whether the preliminary
26 order of forfeiture should be entered in light of all the record evidence in this case. Fed. R. Crim. P
27 43(b)(3); *see also United States v. Mincey*, 800 F. App'x 714, 731 (11th Cir. 2020) (concluding that
28 waiver of an evidentiary hearing negates the necessity of a defendant's presence at the entry of a

preliminary order of forfeiture pursuant to Rule 43 where there is no prejudice to defendant). Based on the current record, including a prior sentencing hearing and completed briefing on forfeiture, there will be no prejudice to conducting the forfeiture hearing by video. The Court should, therefore, overrule defendant's objection and proceed with the video hearing as scheduled pursuant to Rule 43(b)(3).

C. The Court Should Deny Defendant's Motion For Reconsideration Without A Hearing

The only aspect of the upcoming hearing that defendant does not object to is the Court's consideration of his motion for reconsideration of denial of review of Magistrate Kim's June 22, 2020 order denying release pending sentencing. Defendant's effort to cherry pick and agree to video on only those matters for which he wants an immediate ruling, i.e. bail pending appeal, and to indefinitely forestall the Court's consideration of legal issues which will likely result in an adverse restitution order and forfeiture of the house should be rejected. First, as Judge Kim aptly held in her order denying defendant's "emergency" motion for bail, there is no right to a hearing on a motion for bail *after* conviction. Dkt 271, pg. 5 (under seal). That being so, there certainly is no right to a hearing on a motion for reconsideration of denial of bail *after* conviction and sentencing.

Second, as already addressed in the government's brief on this issue, Dkt. 348, the defendant's motion for reconsideration is untimely, moot, and procedurally barred under Rules 37 and 59(a). Thus, there should be no hearing, video or otherwise, on a motion for which there is no right to a hearing in the first place and which is, in any event, procedurally barred.

CONCLUSION

For the foregoing reasons, the Court should proceed by video conference and should deny defendant's motion for reconsideration, Dkt 340, without a hearing.

DATED: December 8, 2020

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

/s/

ROBIN L. HARRIS
LLOYD FARNHAM
CHRIS KALTSAS
Assistant United States Attorneys